BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT D. MUNSCH	)	
Claimant	)	
VS.	)	
	)	Docket No. 203,713
DILLON COMPANIES, INC.	)	
Respondent,	)	
Self-Insured	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

This Order addresses two appeals. In the first appeal, the respondent contests the May 6, 1999 Order in which Administrative Law Judge Brad E. Avery granted the Workers Compensation Fund's motion to withdraw the stipulation that respondent retained claimant as a handicapped worker within the meaning of K.S.A. 44-567(a). In the second appeal, the respondent contests the June 10, 1999 Award in which the Judge denied respondent's request for reimbursement from the Workers Compensation Fund. The Appeals Board heard oral argument on October 27, 1999.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the respondent, Dillon Companies, Inc. (Dillon Companies). Eugene C. Riling of Lawrence, Kansas, appeared for the Workers Compensation Fund (Fund). The claimant did not appear as he settled his claim with the respondent in August 1995.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Appeals Board, the parties agreed that the documents presented by the respondent relating to the settlement of claimant's Americans With Disabilities Act claim were to be considered part of the evidentiary record. Those documents may be found in the exhibits attached to the June 2, 1999 Wynne Dillon deposition, which is also part of the evidentiary record in this claim.

ISSUES

This is a claim for repetitive use injuries to both upper extremities. Claimant gradually began having symptoms in his hands while working as a meat market manager for the respondent and in December 1992 reported those symptoms to the respondent. Following carpal tunnel release surgeries in January and February 1993, claimant returned to work for the respondent in June 1993 and continued to work there until he was terminated in March 1994.

The claimant and the respondent settled the issues between them in August 1995, leaving intact respondent's claim for reimbursement against the Fund. In October 1998, the respondent filed an Application for Hearing with the Division of Workers Compensation to pursue its claim against the Fund.

In its claim against the Fund, the respondent contends that claimant sustained a second series of repetitive accidents and injuries from June 1993 through March 1994, when claimant returned to work for the respondent following surgery, and, therefore, it was that second series of repetitive injuries that caused claimant's termination. Thus, the respondent requests reimbursement for either all or part of the benefits paid in this claim.

After allowing the Fund to withdraw its stipulation that the respondent retained claimant in its employment within the meaning of K.S.A. 44-567, Judge Avery ruled that the Workers Compensation Fund did not have any liability in this proceeding.

The respondent contends the Judge erred by (1) granting the Fund's motion to withdraw its stipulation, (2) failing to find that claimant sustained a second series of accidental injuries that prevented him from continuing to work for the respondent, and (3) not assessing either all or part of the liability against the Fund.

Conversely, the Workers Compensation Fund contends the Judge erred (1) by failing to find that the Application for Hearing filed by respondent in October 1998 was untimely and, therefore, respondent's claim against the Fund was barred and (2) by failing to find that respondent did not make a good faith effort to accommodate and retain a handicapped employee. Additionally, the Fund challenges the reasonableness of the August 1995 settlement.

The issues before the Appeals Board in these two appeals are:

1. Did the Judge err by allowing the Workers Compensation Fund to withdraw its stipulation that the respondent retained claimant in its employment within the meaning of K.S.A. 44-567(a)?

2. Is the respondent barred from seeking reimbursement from the Workers Compensation Fund under K.S.A. 44-534 because the respondent filed the Application for

Hearing in October 1998, which was more than three years after claimant's March 1994 termination and more than two years after the August 1995 settlement hearing?

3. Did the claimant sustain a second series of repetitive use injuries from June 1993 through March 1994?

4. What is the extent of liability, if any, of the Workers Compensation Fund?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Mr. Robert D. Munsch worked for Dillon Companies, Inc., for approximately 29 years. While working as a meat market manager in one of Dillon's grocery stores, Mr. Munsch gradually developed symptoms in his hands. In December 1992, Mr. Munsch became concerned when his hands began locking and he then reported his symptoms to the company who referred him to Dr. Brad W. Storm.

2. In January 1993, Dr. Storm performed a right carpal tunnel release and in February 1993 performed a left carpal tunnel release. After recuperating from those surgeries, Mr. Munsch returned to work for Dillon Companies, Inc., in an accommodated position.

3. Dr. Brad W. Storm, the treating surgeon, released claimant to return to work in April 1993 with temporary medical restrictions against lifting more than 50 pounds, repetitive forceful gripping or pinching, and repetitive hand motion greater than six repetitions per minute. The restrictions, which were limited to four weeks, read:

> Light duty - 50 lbs pound [sic] lifting restriction, no repetitive forceful gripping or pinching or repetitive motion of the involved hand over 6 repetitions per minute. This applies to the involved hand. Avoid sustained gripping and cold environment.

The doctor also indicated on the April 26, 1993 work release slip that Mr. Munsch would then be released to full duty without restrictions. The doctor's office also noted that Mr. Munsch's next appointment was scheduled for June 10, 1993.

4. Wynne Dillon, the district manager over the store where Mr. Munsch worked, believed that Mr. Munsch's restrictions were temporary and allowed him to return to work in an accommodated position. Dillon Companies provided Mr. Munsch with accommodated work. Rather than working the 48 to 60 hours per week that he worked before his surgeries, upon his return he only worked 40 hours per week. He also performed duties outside the meat department such as facing shelves, which is moving the various cans and containers forward on the shelves. In addition to that type of work, Mr. Munsch assisted in the meat department as he ordered, scheduled, and checked prices.

Also, when he worked in the meat department he limited any cutting and slicing that he would do and he would wear gloves when he worked in the cold.

5. Despite those accommodations, Mr. Munsch continued to experience symptoms in his hands and arms. When he returned to Dr. Storm in June 1993, the doctor reduced the weight lifting restriction to 10 pounds per arm. According to Mr. Munsch, after that release he returned to his job as the meat market manager. Despite observing his medical restrictions and wearing gloves for warmth, Mr. Munsch continued having symptoms in his hands and arms and was especially bothered by the cold.

6. On September 15, 1993, Mr. Munsch returned to Dr. Storm complaining of forearm and arm pain. The doctor's work release slip from that date notes that the doctor's examination revealed no new findings. The doctor did not change the medical restrictions. But according to Mr. Munsch, Dr. Storm referred him to another doctor. The list of medical bills indicates that doctor was Dr. David Smithson, whom Mr. Munsch saw a total of three occasions in September and October 1993. In this same time frame, Mr. Munsch also consulted Dr. Lynn D. Ketchum.

7. By letter dated October 18, 1993, Dr. Storm wrote Dillon Companies and stated that Mr. Munsch had reached maximum medical improvement and that he had a 22 percent whole body functional impairment due to the bilateral carpal tunnel syndrome.

8. After seeing Dr. Storm in January 1994, Dr. Storm issued a final release dated January 19, 1994 that retained the 10-pound lifting restriction and also retained the other restrictions that he had placed on Mr. Munsch in April 1993.

9. After receiving the final release and restrictions, on approximately March 31, 1994, Dillon Companies terminated Mr. Munsch advising him that he could not work as a meat market manager. Believing he had been wrongfully terminated and believing he could perform approximately 96 percent of his former meat market manager job duties, Mr. Munsch filed an action in federal court alleging violations of the Age Discrimination in Employment Act, Americans With Disabilities Act, and the Kansas Act Against Discrimination, and for retaliatory and wrongful discharge.

10. By written agreement dated August 11, 1995, Dillon Companies and Mr. Munsch agreed to settle the workers compensation claim and the various other claims for $90,000 with the parties agreeing that the settlement would be paid in two checks. One check for $30,000 would be paid in settlement of the federal suit and the other check for $60,000 would be paid in this workers compensation proceeding. The agreement read, in part:

> 1. The sum of Ninety Thousand Dollars ($90,000) shall be paid in two checks to the order of Robert L. [sic] Munsch and Scott J. Bloch, his attorney, as follows:

> (a) Thirty Thousand Dollars ($30,000) shall be paid in settlement of the tort and Americans With Disability [sic] Act claims of the Suit, which represents compensation for non-economic damages and attorneys' fees. This check shall be paid upon execution of this Agreement and the dismissal of the Suit.
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> (b) Sixty Thousand Dollars ($60,000) shall be paid at the settlement conference before [Special] Administrative Law Judge Robert M. Telthorst, currently scheduled for August 15, 1995, at 10:20 a.m. ("Settlement Conference").
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> . . .
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> 4. At the Settlement Conference, Munsch shall release Dillons from all claims in any way related to work-related injuries, including the claim filed on December 1, 1992, before the Division of Workers' Compensation, with the exception of claims for future medical treatment made upon application to the Director of Workers' Compensation within four (4) years of the date of the Settlement conference. . . .

11. On August 15, 1995, Mr. Munsch settled his workers compensation claim with Dillon Companies receiving $60,000. The settlement worksheet presented to the special administrative law judge indicated the $60,000 payment represented a strict compromise of all issues. The worksheet read, in part:

> A lump sum payment as a strict compromise of all issues, including, but not limited to, past medical; nature and extent of disability; review and modification; and vocational rehabilitation benefits. Future Medical will remain open upon appropriate application to the Director within four (4) years from the date of accident. The issues between the respondent and insurance carrier [sic] are reserved.

12. In October 1998, Dillon Companies filed an Application for Hearing to pursue its claim against the Fund.

13. Dillon Companies, Inc., alleges that Mr. Munsch sustained additional injury during that period following the January and February 1993 surgeries until his March 1994 termination. The doctors who saw and treated Mr. Munch during that period did not testify. But Dillon Companies deposed Dr. Pedro Murati after hiring him to review both Mr. Munsch's medical records and deposition testimony. Dr. Murati did not examine Mr. Munsch. But based in large part upon conclusions in medical records from doctors David G. Smithson and Lynn D. Ketchum that were not introduced into evidence, Dr. Murati concluded that Mr. Munsch sustained additional injury while working for Dillon Companies after his surgeries. Over the Fund's objections as to foundation, Dr. Murati testified:

A. (Dr. Murati) Okay. Yeah, he obviously "sustained a second series of injuries to his upper extremities while performing his normal duties of employment, beginning September of '93 and continuing up through the last date of his employment on March 23, '94."

Q. (Mr. Mann) All right, and according to your report, the bases for your opinion in that regard are the medical records of Dr. David G. Smithson and Dr. Lynn Ketchum; is that correct?

A. That's right.

Q. And what was it in those reports which led you to believe that he had sustained a second series of injuries?

A. Well, there's the examinations by the doctors.

Q. All right.

A. And their conclusions. I mean, do you want me to specifically --

Q. Well, Doctor, I'm looking at your report. On the second page you indicate --

A. Yeah.

Q. And I'm putting this in quotes: "The medical records of Drs. David G. Smithson and Lynn D. Ketchum reflect that the claimant's symptoms of pain and numbness in both hands and wrists significantly increased during this period of time to the point that the claimant was unable to continue his employment with Dillons."

A. That's correct.

Considering the rest of the evidentiary record, the Appeals Board finds that the conclusions in doctors Smithson's and Ketchum's medical records that Mr. Munsch's pain increased to the point that he was unable to continue his employment with Dillon Companies is inaccurate. Dr. Murati's opinion that Mr. Munsch sustained additional injury is suspect for that reason. Dr. Murati's opinion is even more suspect in light of Mr. Munsch's testimony that he worked within his medical restrictions when he returned to work, that he felt he could physically do 96 percent of his duties as a meat market manager, and that he did not do the production-type cutting when he returned to work. Further, Dr. Murati admitted on cross-examination that he was not aware of Mr. Munsch's work activities or job classification at Dillon Companies or that he was terminated despite his objections and contentions that he could do the meat market manager job.

14. Dr. Murati testified that Mr. Munsch's real problem was causalgia of the median nerves or reflex dystrophy of the hands caused by the surgeries. The doctor testified:

> Q. (Mr. Mann) All right. Doctor, taking into consideration those tasks from July of '93 through March 24th of 1994, are you of the belief that that type of work activity if, in fact, correct would have resulted in a second series of injuries?
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> Mr. Riling: To which we will object as highly speculative.
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> A. (Dr. Murati) Well, they certainly didn't help matters, but this case -- unfortunately, I think his real diagnosis was missed after the surgeries. What happened to this man, he had causalgia of the median nerves. That's why his hands were going numb, they were changing colors, he had vascular problems and they were going cold. This man had reflex sympathetic dystrophy of the hands from the surgeries which, of course, was aggravated just by being at work or anywhere that he did any kind of repetitive work he did, any kind of exposure to cold would have made matters worse. So essentially, that's my opinion.

15. The Appeals Board finds that Dr. Murati's opinion should be given little weight because of its lack of foundation as it appears to be based on assumed facts that are contrary to the evidence. The Appeals Board finds that Dillon Companies has failed to prove that it is more probably true than not that Mr. Munsch sustained additional injury after he returned to work following his surgeries or that any increased symptoms that he did experience were anything more than the natural consequence of the bilateral carpal tunnel syndrome or anything more than a temporary flare-up of symptoms.

CONCLUSIONS OF LAW

1. The Order that set aside the Fund's stipulation that Dillon Companies retained Mr. Munsch in its employment within the meaning of K.S.A. 44-567(a) should be affirmed. Likewise, the Award denying the request for reimbursement from the Fund should also be affirmed.

2. Dillon Companies contends the Judge erred by permitting the Fund to withdraw its stipulation that the company retained Mr. Munsch in its employment "within the meaning of K.S.A. 44-567(a)." The Appeals Board concludes that contention is without merit. Kansas Administrative Regulations specifically provide that the administrative law judges have the authority to set aside stipulations as warranted. The regulations provide:

> Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.[1]

By Order dated May 6, 1999, the Judge set aside the Fund's stipulation because the stipulation was inconsistent with the evidence and had been made in error. After setting aside the stipulation, the Judge granted Dillon Companies additional time to submit evidence on the issue.

The Judge did not err.

3. The Fund contends that Dillon Companies' Application for Hearing was filed too late and, therefore, the claim for reimbursement is barred. The Workers Compensation Act provides:

> (a) Whenever the employer, workman or insurance carrier **cannot agree upon the workman's right to compensation** under the workmen's compensation act **or upon any issue in regard to workmen's compensation benefits due the injured workman** thereunder, the employer, workman or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. . . .
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> (b) No proceeding for compensation shall be maintained under the workmen's compensation act unless an application for a hearing is on file in the office of the director within three (3) years of the date of the accident or within two (2) years of the date of the last payment of compensation, whichever is later.[2] (Emphasis added.)

But the Appeals Board has previously held that the time limits set forth above do not apply to claims for reimbursement against the Fund.[3] As the statute specifically states, it applies to instances where there is disagreement regarding the benefits due the worker. The language of the statute cannot be reasonably stretched to apply to claims for reimbursement from the Fund.

The Judge did not err by denying the Fund's request for dismissal.

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[1] K.A.R. 51-3-8.

[2] K.S.A. 44-534 (Ensley).

[3] Hess v. Continental Plastic Containers, WCAB Docket No. 203,687 (September 1998).

4. Before liability can be assessed against the Fund, an employer must prove that it either hired or retained a worker in its employment despite having knowledge that the worker had an impairment that constituted a handicap.[4] A handicapped individual is defined as one who is afflicted with an impairment of such character that it constitutes a handicap in obtaining or retaining employment.[5]

5. Before liability can be assessed against the Fund, the employer must also prove that (a) the handicapped worker sustained a second injury or disability that probably or most likely would not have occurred but for the preexisting physical or mental impairment[6] or (b) when the second injury probably would have occurred regardless of the preexisting impairment, the preexisting impairment contributed to the disability resulting from the second injury.[7] In either event, a second injury is required.

6. As indicated above, the Appeals Board concludes that Dillon Companies has failed to prove that Mr. Munsch sustained a second series of repetitive traumas or injuries after he returned to work following his surgeries. The Appeals Board recognizes that Mr. Munsch may have experienced increased symptoms in September 1993 that prompted him to return to see Dr. Storm. The mere fact that Mr. Munsch experienced symptoms does not prove that he sustained additional injury. There would appear to be two other possibilities – the symptoms are the residual effects of the bilateral carpal tunnel syndrome or the symptoms are the result of a temporary exacerbation. As Dr. Storm indicated in his work release slip, he found no new findings in the September 15, 1993 examination. And according to Mr. Munsch, he was not violating his medical restrictions. Considering the fact that Mr. Munsch had undergone surgery to both wrists, it is reasonable to conclude that he might experience symptoms as a natural consequence of his injuries.

7. Based upon the above, the Appeals Board concludes that Dillon Companies has failed to prove that Mr. Munsch sustained additional work-related injury after he returned to work following surgery or that the symptoms that he experienced after returning to work were anything more than the natural consequence of his bilateral carpal tunnel syndrome or merely a temporary flare-up of symptoms.

8. There is a second reason that the Dillon Companies claim against the Fund should be denied. Assuming that Dillon Companies could prove that Mr. Munsch sustained a second accidental injury, the August 15, 1995 settlement represented the benefits that Mr. Munsch would have been entitled to receive for both of those accidents. There is no

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[4] K.S.A. 44-567(a).

[5] K.S.A. 44-566.

[6] K.S.A. 44-567(a)(1).

[7] K.S.A. 44-567(a)(2).

question that Dillon Companies would be entirely responsible for the first accident and that Dillon's claim for reimbursement is limited to the alleged second accidental injury only. But neither the settlement transcript nor the settlement worksheet apportions the $60,000 lump sum settlement between the accidents or the amounts being paid for waiving the rights to medical benefits, vocational rehabilitation benefits, and review and modification. The failure to apportion the settlement and lack of evidence otherwise precludes any recovery from the Fund as the Appeals Board would have to speculate what portion of the settlement represented the first accidental injury only. Because Mr. Munsch's work restrictions did not materially change after June 1993, a strong argument could be made that a major portion of the lump sum settlement represented Mr. Munsch's first accidental injury when he developed the bilateral carpal tunnel syndrome and for which he received the restrictions against repetitive hand movement.

9. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the May 6, 1999 Order and the June 10, 1999 Award, both entered by Judge Brad E. Avery.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
Eugene C. Riling, Lawrence, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director